

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

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77-6125

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

77-6125

IN THE MATTER OF:
ESTABLISHMENT INSPECTION OF:
M & B INDUSTRIES CORPORATION



On Appeal From
The United States District Court
for The Eastern District Of New York

FILED

M & B INDUSTRIES CORPORATION
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BEST COPY AVAILABLE

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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ESTABLISHMENT INSPECTION OF . Docket # 77-6125
M & B INDUSTRIES CORPORATION .
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APPELLANT'S BRIEF

TO THE HONORABLE JUDGES OF THE COURT OF APPEALS

M & B INDUSTRIES CORPORATION hereby appeals from the Order of the Honorable Judge Thomas C. Platt issued July 25, 1977.

This case involves the Department of Labor's application for a search warrant to inspect the premises of M & B INDUSTRIES CORPORATION at 1261-34 Street, Brooklyn, New York.

As is established by law, a request for a search warrant must be accompanied by sworn application that there is probable cause that a violation of law exists, as well as a neutral magistrate (or Judge in this case) being made aware of how many times a business is inspected. (In this case, in fact, false information in this regard was provided to the Judge).

In this case, the only sworn affidavit says that an unsworn (in fact, false) complaint (or rather letter requesting an inspection) was made by the Fire Department of the City of New York alleging a violation of "poor housekeeping."

However, we must examine this letter. The letter claims that

Inspections conducted by this department have disclosed a number of serious safety violations, however, due to the poor attitude and noncooperation of the building owner many of these violations remain uncorrected, even after summary action. It has become necessary for this department to appear before the courts in order to obtain inspection warrants whenever it is necessary to gain access to these buildings.

This is absolutely false! The Fire Department has conducted many inspections, most recently on March 18, 1977 and on August 31, 1977 (the second after this case was heard by the District Court). No violations at all were found.

The letter also refers to summary action, but ignores the results of the summary action. The results were, in fact, a dismissal of all charges.

Furthermore, the letter refers to appearing before the courts to obtain inspection warrants. This never happened. The Fire Department never requested a warrant to inspect, from any court.

The only occasion that the Fire Department might be referring to is when, in the previously mentioned criminal court case, the Honorable Judge Schilling (New York City Judge) viewed the premises in question and then dismissed the charges. At the time, no mention at all was made of warrants, as the issue was never brought up (being irrelevant).

So much for probable cause, a constitutionally guaranteed right, as well as knowledge of how many inspections were made.

One other defect in the Labor Department's Application involves the fact that the Labor Department lacks the jurisdiction to pursue this case. First, it has failed to show that M & B is involved in interstate commerce. Second, the Labor Department has no jurisdiction to issue violations for "...so-called 'nuisance standards' or standards which do not deal with workplace conditions that are clearly hazardous to the health or safety of workers or are more properly under the jurisdiction of State Departments of Public Health." (emphasis added)¹

Therefore, if, for arguments sake, the Fire Department letter is true, the Labor Department is nevertheless prohibited to issue a violation on information provided by the Fire Department, since the Fire Department can (and did not, though it had the opportunity) issue its own violation, if there would be a violation.

Another point concerns the Labor Department's insistence that "the Secretary has reasonable grounds to believe that serious safety hazards exist on the subject premises and any delay in the inspection might subject employees of the appellant to serious dangers" falls apart when one considers that the basis for this grounds is

¹ From the Labor Department's appropriation, quoted in a letter dated April 15, 1976 by Morton Cern, Assistant Secretary of Labor, ER Dec. 76-11325 Filed 4-22-76; 8:45 am printed in the Federal Register, vol. 41, No. 80- 104w, April 23, 1976, Book 2.

a false "communication from the Fire Department of the City of New York addressed to OSHA Regional Administrator Alfred Barden."²

There are many citations of cases cited in the Labor Department's memorandum. In all of those that require warrants, the constitutional requirements of sworn probable cause still exist. Of those cases that do not require warrants, they involve, exclusively, cases of governmentally licensed businesses (such as Food, Drug and Cosmetics, Coal mines, Narcotics, Railroads, Alcohol, Tobacco, and Firearms) and government contractors (under the Walsh, Healy Act) where the government, as part of its regulatory permission to conduct business, or as part of the government's purchase conditions, reserves the right to make warrantless inspections.

There are many cases where District Judges refused to issue warrants. These include Brennan v. Gibson Products of Plano, Inc., 407 F. Supp. 154, 162-163 (D.Tex.) (three-judge court), appeal pending, C.A. 5, No. 76-1526; Dunlop v. Hertzler Enterprises, 418 F.Supp. 627 (D.N. Tex.) (three-judge court), appeal pending, C.A.10, No. 76-2020; Usery v. Rupp Forge No. 3 76-345 (N.D. Ohio), appeal pending, C.A. 6, No. 76-1360; Usery v. Centrif-Air Machine Co., 424 F.Supp. 989 (D. Cal.). In these cases, the Labor Department's Memorandum of Law notes, the court read a warrant requirement into Section 8(a) to preserve its constitutionality and nevertheless refused to issue warrants (probably because of lack of probable cause shown).

Other similar cases are pending before a three-judge court in Boise, Idaho and Albuquerque, New Mexico. More are pending before single judges. These judges are awaiting a decision in the Gibson case.

This brings up the question of the denial of a three-judge court, as requested by M & B. This request was made in writing for another reason, that being the District Court's denying M & B to properly present its arguments.

Already, the short transcript of the hearing shows that the Court did not allow M & B to properly present its arguments. The record shows M & B insisting that this case originated from the Fire Department and the Court refused to listen to Mr. Friedman's explanation.

²From the Affidavit of Stephen G. Dubner, August 25, 1977.

Then Mr. Friedman began to explain that the papers were not served on an officer of M & B as required by the Show Cause Order. The Labor Department neglected to comply with this requirement. The Court cut off Mr. Friedman from speaking.

Then Mr. Friedman again began to explain that it was not shown that M & B affects interstate commerce (which it does not). The Court then began to "change the subject" and then the Judge said he will sign the warrant. When Mr. Friedman protested, saying, "Your Honor, I didn't finish my words, please," (p.9, line 20) the Court said, "As far as I am concerned, you are finished" to stop Mr. Friedman from presenting arguments for M & B. When Mr. Friedman asked to submit papers to the (District) Court, the Judge said, "No" (p.9, line 8).

This handling of the case by the Judge is incredulous, and altogether does not allow M & B to properly dispute the truthfulness of the Labor Department's allegations, which are altogether false, as shown by this brief. This denial of M & B's rights to properly challenge the Labor Department's false allegations forces M & B to request this Court to consider questions of fact which it usually does not consider. However, in this case, we must ask this Court to consider these questions and appropriately dismiss the warrant.

One short comment we will not elaborate on concerns the behavior of the CSHA representatives while at the plant several times.

In summary, the following points are brought out in this brief,

- 1) No sworn or notarized showing of probable cause of a violation existing.
- 2) Proof, in the form of no Fire Department violations, that no violations exists.
- 3) Excessive number of inspections in just this year.
- 4) Lack of jurisdiction with regard to interstate commerce.
- 5) Lack of jurisdiction with respect to Congress' declining to give the Labor Department concurrent jurisdiction with local public health authorities (here-the New York City Fire Department).
- 6) Many citations of cases showing a need for sworn probable cause.
- 7) No sworn showing of probable cause in this case.

- 8) Many citations of cases of Judges refusing to issue warrants including in Georgia, where the Northern District has enjoined warrantless searches (Usery v. Centriff-Air Machine Co., Inc., 4 BNA OSHC 1961 (N.D. Ga. 1977)) and a three-judge court in Idaho having held section 8(a) unconstitutional (this section provides for OSHA inspections, not warrants as claimed by the Labor Department), Barlow's Inc. v. Usery, CCH, 1976-1977, OSHD, p.25,709 (D. Idaho 1976), among many other cases, including cases which are awaiting Supreme Court review before a final decision.
- 9) The denial of a three-judge court in this constitutional case.
- 10) The Judge's preventing M & B from presenting arguments opposing the Labor Department's application.
- 11) The OSHA representatives' offensive behavior while at the plant several times.
- 12) The failure to serve M & B with the Show Cause Order, the Application, and the Memorandum of Law.

For these, and other reasons, we request this Court to dismiss, in full, the Warrant signed by Judge Platt on July 25, 1977.

Respectfully submits,
M & B INDUSTRIES CORPORATION
Brooklyn, New York 11218

U.S. POSTAL SERVICE
CERTIFICATE OF MAILING

Received From:
M & B INDUSTRIES
1261-38 ST
BKLYN NY 11218

One piece of ordinary mail addressed to:
FRANCIS U. LARUFFA / REGIONAL SOLICITOR / U.S.
DEPAR OF LABOR / 1515 BROADWAY / ROOM
RM 3555 / NEW YORK, NY 10036

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